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No. 671

In the Supreme Court of the United States

OCTOBER TERM, 1958

A. D. JUILLIARD & CO., INC., PETITIONER

v.

JAMES W. JOHNSON, Collector of Internal Revenue for the Third District of New York

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 37a-60a)[1] is reported at 166 F. Supp. 577. The opinions of the Court of Appeals (Pet. 1a-16a) are reported at 259 F. 2d 837.

[1] Record references are to the Appendix to the taxpayer's brief in the Court of Appeals. Supplemental record references are to the Collector-Appellee's appendix in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1958. (Pet. 17a.) A petition for rehearing was denied on October 31, 1958. (Pet. 18a.) The petition for a writ of certiorari was filed on January 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, on the facts found, the courts below correctly held that taxpayer corporation, in computing its excess profits taxes for 1943, might not deduct as business expenses any part of the amount that it paid to the United States in settlement of its liability for violating Regulations of the Office of Price Administration.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23:

SEC. 205. *Enforcement.*

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. * * *

* * * * *

(50 U.S.C. App. 1946 ed., Sec. 925.)

STATEMENT

The material facts as found by the District Court (R. 2a-33a, 60a) and the Court of Appeals (Pet. 1a-11a, 13a) may be summarized as follows:

This is an action for the recovery of excess profits taxes for 1943 instituted by the taxpayer corporation.

The suit raised the issue of taxpayer's right to deduct two items, $410,219.31 and $4,184.63,[2] as business expenses. Both of these sums were paid by taxpayer to the Office of Price Administration in compromise and settlement of a suit for treble damages for price violations brought by OPA against taxpayer in 1942. The OPA complaint rested upon a multitude of items, the aggregate amount of alleged overcharges being $391,249.29; treble damages on this total claim would have amounted to $1,173,747.87. (R. 2a, 3a; 18a-19a; Pet. 1a-2a, 5a.)

After the settlement was effectuated and payment of the $410,219.31 had been made in January 1943, taxpayer claimed that there was an error in the formula used to arrive at the settlement figure of $410,291.31. The alleged error was that a certain fabric known as A-2391 should have been treated as similar to another fabric (A-2313) rather than as a new fabric. Had A-2391 been regarded in this light, it would have carried, the argument runs, a different ceiling price, and the amount of overcharges attributable to this item would have been $66,023.76, rather than $110,098.30. The difference, when trebled, is $132,223.62. To this extent, taxpayer contends, the settlement was not accurately computed and taxpayer is entitled to a business-expense deduction. (R. 26a-29a; Pet. 9a.)

The stipulation of settlement provided that "this stipulation binds defendant for all purposes, and not merely for this action." The amount agreed upon

[2] No question as to the $4,184.63 is here involved.

($410,219.31) was paid "in full settlement and compromise of any and all claims of the plaintiff arising out of the facts specified in Count II of the complaint." (R. 28a; Pet. 11a; see also Exhibit 43.1, Supp. R. 27a.)

There was no mutual mistake of fact inducing the settlement and it was reached after extended negotiations. The violations of taxpayer covered by the settlement were due to taxpayer's negligence and its failure to take proper precautions. (R. 27a, 60a; Pet. 9a, 11a.)

Upon the basis of the entire record, both courts below concluded that it would frustrate the policy of the Emergency Price Control Act to allow any part of the $410,219.31 payment as a deduction for business expenses. Taxpayer's complaint and its claims for such deduction were accordingly dismissed (R. 54a, 60a; Pet. 15a).

ARGUMENT

Both courts below (including the dissenting judge in the Court of Appeals) were in full agreement that taxpayer might not deduct, as ordinary and necessary business expenses, payments made to the United States in settlement of charges that taxpayer had been guilty of willful or negligent violations of OPA ceiling price regulations. This, of course, is in full accord with the principles only recently elaborated by this Court in *Tank Truck Rentals* v. *Commissioner*, 356 U. S. 30, 36-37.[3] The only

[3] See also *Jerry Rossman Corp.* v. *Commissioner*, 175 F. 2d 711 (C.A. 2d); *National Brass Works* v. *Commissioner*,

point of disagreement in the Court of Appeals was as to whether, in the particular circumstances, the compromise settlement of the OPA charges could be dissected and whether it could be said that it rested in definite and ascertainable part upon a mistaken view of the extent of some of the violations. This involves an assessment of the parties' understanding, the course of the compromise negotiations, and the compromise agreement itself. It does not involve any question of general importance.

The majority below found "that no part of the total sum of $410,219.31 paid in settlement of the civil suit can be said to have been paid for any specific violation." (Pet. 11a.) It also found that the "very motive for the settlement was the uncertainty of establishing specific overcharges on many of the items." (Pet. 13a.) Finally, it found the evidence "more than sufficient" to sustain the District Court's holding that the violations were so many and so basic that they reflected, at the least, negligence and a failure to take proper precautions. (Pet. 9a.)

If, as found below, the settlement represented a lump settlement covering a multitude of violations, and determinate amounts cannot be attributed or assigned to individual charges, the result reached was the only possible one. Where a settlement is in gross, there is obviously no means of appraising the "give and take" on particular issues. Thus the sug-

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205 F. 2d 104 (C. A. 9th); *George Schaefer & Sons* v. *Commissioner*, 209 F. 2d 440 (C. A. 2d); Rev. Rul. 54-204, 1954-1 Cum. Bull. 49; and cf. *Milton S. Kronheim & Co.* v. *United States*, 163 F. Supp. 620 (C. Cls.).

gestion that taxpayer may have had defenses (or partial defenses) on some issues overlooks the fact that taxpayer, had it gone to trial on the violation charges, might have suffered a liability very substantially in excess of the amount of the settlement. On the findings below, it cannot be said that any portion of the settlement represents a sum paid under misapprehension or mistake. Rather, the settlement represents a liquidation of the entire liability for a congeries of acts and practices which were in contravention of federal law and policy. As such, it is, on settled principles, non-deductible.

CONCLUSION

The case presents no issue of general importance. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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